

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

11 CHRISTOPHER TROUT, } 2:04-CV-01466-BES-LRL
12 Plaintiff, }
13 v. } ORDER
14 BMW OF NORTH AMERICA, a corporation }
15 or business entity; BMW FINANCIAL }
16 SERVICES, a corporation or business entity;)
17 DESERT BMW of HENDERSON, a Nevada }
corporation, and DOES 1 through 10, }
inclusive, }
18 Defendants.)

19 Currently before this Court is a Motion for Summary Judgment or in the Alternative,
20 Motion for Partial Summary Judgment (#27) filed by Defendants BMW of North America, LLC,
21 BMW Financial Services and Desert BMW of Henderson (collectively "BMW") on June 23,
22 2006. Plaintiff Christopher Trout ("Trout") filed an Opposition (#31) on August 1, 2006 and
23 Defendants filed a Reply (#32) on August 15, 2006.

24 **I. BACKGROUND**

25 This action arises out of Trout's lease of a BMW vehicle in March of 2003 from Desert
26 BMW. The lease agreement was between Trout and BMW Financial. Pursuant to the terms
27 of the lease, Trout agreed to make monthly payments in the amount of \$949.97. On
28 December 4, 2003, the vehicle had a tire blow-out and was towed to Desert BMW's repair

1 facility. According to Trout, the vehicle remained there for over 30 days. At the request of
 2 Trout, BMW North America offered to buy back the vehicle, including reimbursing Trout for the
 3 down payment, the payments made on the vehicle and attorneys' fees. Trout rejected this
 4 buy-back offer after learning on February 24, 2004, that BMW Financial had reported at least
 5 one derogatory remark to credit reporting agencies based on his delinquent payments. Trout
 6 alleges that because of the derogatory credit mark, he was prevented from securing a loan.

7 Trout filed this action, seeking damages for violations of the Fair Credit Reporting Act,
 8 the Magnuson-Moss Warranty Act, Nevada's statutory "lemon law" and various state law claims
 9 for relief.

10 **II. ANALYSIS**

11 Federal Rule of Civil Procedure 56 provides that summary judgment "shall be rendered
 12 forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file,
 13 together with the affidavits, if any, show that there is no genuine issue as to any material fact
 14 and that the moving party is entitled to judgment as a matter of law." FED. R. Civ. P. 56(c).
 15 Summary judgment is "not warranted if a material issue of fact exists for trial." Ribitzki v.
 16 Canmar Reading & Bates, 111 F.3d 658, 661–62 (9th Cir. 1997). A material fact is one that
 17 "might affect the outcome of the suit under the governing law . . ." Lindahl v. Air France, 930
 18 F.2d 1434, 1436 (9th Cir. 1991) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248–49
 19 (1986)). Further, any dispute regarding a material issue of fact must be genuine—the
 20 evidence must be such that "a reasonable jury could return a verdict for the nonmoving party."
 21 Id. Thus, "[w]here the record taken as a whole could not lead a rational trier of fact to find for
 22 the nonmoving party, there is no genuine issue for trial" and summary judgment is proper.
 23 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

24 Once the moving party presents evidence that would call for judgment as a matter of
 25 law at trial if left uncontested, the respondent must show by specific facts the existence of
 26 a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). "[T]here
 27 is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury
 28 to return a verdict for that party. If the evidence is merely colorable, or is not significantly

1 probative, summary judgment may be granted." *Id.* at 249-50 (citations omitted). "A mere
 2 scintilla of evidence will not do, for a jury is permitted to draw only those inferences of which
 3 the evidence is reasonably susceptible; it may not resort to speculation." British Airways Board
 4 v. Boeing Co., 585 F.2d 946, 952 (9th Cir. 1978); see also Daubert v. Merrell Dow
 5 Pharmaceuticals, Inc., 509 U.S. 579, 596 (1993) ("[I]n the event the trial court concludes that
 6 the scintilla of evidence presented supporting a position is insufficient to allow a reasonable
 7 juror to conclude that the position more likely than not is true, the court remains free . . . to
 8 grant summary judgment.").

9 The district court may determine whether there is a genuine issue of fact, on summary
 10 judgment, based on the papers submitted on the motion and such other papers as may be on
 11 file and specifically referred to and facts therein set forth in the motion papers. See Carmen
 12 v. San Francisco Unified Sch. Dist., 237 F.3d 1026, 1029-31 (9th Cir. 2001). The district court
 13 need not "scour the record in search of a genuine issue of triable fact," but rather must "rely
 14 on the nonmoving party to identify with reasonable particularity the evidence that precludes
 15 summary judgment." Keenan v. Allan, 91 F.3d 1275, 1279 (9th Cir. 1996) (quoting Richards
 16 v. Combined Ins. Co., 55 F.3d 247, 251 (7th Cir.1995)). Conclusory allegations that are
 17 unsupported by factual data cannot defeat a motion for summary judgment. Taylor v. List, 880
 18 F.2d 1040, 1045 (9th Cir. 1989). Applying these principles, the Court now turns to whether
 19 summary judgment is warranted in this case.

20 The Fair Credit Reporting Act ("FCRA") requires that consumer reporting agencies
 21 adopt reasonable procedures for meeting the needs of commerce for information as to
 22 consumer credit, personnel, insurance, and other information in a manner that is fair and
 23 equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper
 24 utilization of such information in accordance with the requirements of the Act. 15 U.S.C. §§
 25 1681 - 1681x. Trout does not specify in the Complaint which provision of the FCRA he
 26 contends BMW has violated. BMW clearly does not constitute a consumer reporting agency,
 27 but instead is a "furnisher of information." In 1996, Congress amended the FCRA to impose
 28 duties upon persons who furnish information to credit reporting agencies. See, 15 U.S.C. §

1 1681 s-2. Prior to these amendments, the FCRA did not impose any duties on those
 2 furnishing information to credit reporting agencies." Ryan v. Trans Union Corp., 2000 WL
 3 1100440, *1 (N.D. Ill.2000).

4 **A. State Common Law Claims.**

5 BMW argues that Trout's state common law claims are preempted by the Federal Fair
 6 Credit Reporting Act ("FCRA"). Trout claims that the FCRA was never intended to preempt
 7 anything other than mini-credit reporting acts enacted by states over time. Section 1681t
 8 governs the preemptive scope of the FCRA. That section states that as a general matter the
 9 FCRA does not preempt state laws, however, there are critical exceptions to this provision.
 10 See, 15 U.S.C. § 1681t(a). A general exception is found in § 1681(b), which states that no
 11 requirement or prohibition may be imposed under the laws of any state with respect to any
 12 subject matter regulated under § 1681s-2, relating to the responsibilities of persons who
 13 furnish information to consumer reporting agencies. 15 U.S.C. § 681t(b)(F)(1); Cisneros v.
 14 Trans Union, LLC, 293 F.Supp.2d 1167, 1175 (D.Hawaii 2003).

15 The Ninth Circuit has not defined the scope of the preemption under the FCRA.
 16 However, the majority of district courts in the Ninth Circuit have held that the FCRA preempts
 17 state statutory and common law causes of action which fall within the conduct proscribed
 18 under § 1681s-2(a). Cisneros, 293 F.Supp.2d at 1174; Royal v. Equifax, 405 F.Supp.2d
 19 1177, 1179-1180 (E.D. Cal. 2005); Davis v. Maryland Bank N.A., 2002 WL 32713429, *12-13
 20 (N.D.Cal.,2002).¹ The conduct prohibited by furnishers of information pursuant to § 1681s-
 21 2(1) includes the reporting of information with actual knowledge of errors and reporting of
 22 information after notice and confirmation of errors. 15 U.S.C. § 1681s-2(1). In summary,

24 ¹Other district courts from other circuits are in agreement as well. See Aklagi v. Nationscredit
 25 Financial Serv. Corp., 196 F.Supp.2d 1186, 1194-95 (D.Kan.2002) (finding defamation claim
 26 preempted under section 1681t(b)(1)(F)); Hasvold v. First U.S.A. Bank, 194 F.Supp.2d 1128, 1239
 27 (D.Wyo.2002) (finding FCRA preempts state common law claims for defamation, invasion of privacy,
 28 and interference with prospective advantage); Jaramillo v. Experian Info. Solutions, Inc., 155 F.Supp.2d
 356, 362 (E.D.Pa.2001) (Section 1681t(b)(1)(F) preempts Pennsylvania's Consumer Protection law);
 see also National Home Equity Mortgage Ass'n v. Face, 64 F.Supp.2d 584, 592 (E.D.Va.1999) (noting
 in dictum that FCRA meant to preempt state law regulating consumer credit transactions); Korotki v.
Attorney Servs. Corp., 931 F.Supp. 1269, 1280 (D.Mary.1996) (noting in dictum that FCRA would
 preempt tort claims).

1 furnishers of information cannot provide inaccurate information, but if they do, any state
 2 statutory and common law causes of action brought as a result of this conduct are preempted
 3 by the FCRA.

4 The court in Davis, 2002 WL 32713429, *12-13 (N.D.Cal. 2002) reiterated that the plain
 5 language of § 1681t(b)(1)(F) "clearly eliminated all state causes of action against furnishers
 6 of information, not just ones that stem from statutes that relate specifically to credit reporting."
 7 Davis, 2002 WL 32713429, *12 -13, *citing Jaramilo*, 155 F.Supp.2d at 362. The Davis court
 8 went on to explain,

9 ".....the legislative history demonstrates that Congress enacted section
 10 1681t(b)(1)(F) in order to create a uniform scheme governing the disclosure of
 11 credit information. See Kodrick v. Ferguson, 54 F.Supp.2d 768, 794
 12 (N.D.Ill.1999) (discussing legislative history of FCRA's preemption provisions).
 13 Allowing common law tort claims which implicate the same subject matter as
 14 section 1681s-2(1) would undermine Congress' intention to create a uniform
 15 system of protection for consumers. In light of the foregoing, the Court finds that
 16 section 1681t(b)(1)(F) preempts both state statutory and common law causes
 17 of action which implicate the subject matter of section 1681s-2.

18 Pursuant to Davis, Trout's claim that the FCRA only preempts state mini-reporting statutes is
 19 rejected. Thus, the question is to what extent Trout's state claims fall within the prohibition
 20 against reporting or providing inaccurate information.

21 The Court finds that the claims for credit impairment (count 18) and wantonness (count
 22 12) are preempted.² As stated above, BMW is a furnisher of credit and any state law claims
 23 regarding BMW's failure to report or provide accurate information are preempted by FCRA.
 24 Trout's basis for the claims of wantonness and impairment of credit is that BMW Financial
 25 Services negligently caused, directed or otherwise instructed several national credit reporting
 26 agencies to report false and damaging information regarding the credit history of Trout.³
 27 Trout's negligence claims are based upon the assertion that BMW Financial failed to take

28 ² Because the claims for impairment of credit and wantonness are preempted, the Court does
 29 not need to reach the issue of whether the claims of impairment of credit and wantonness state a claim
 30 under Nevada law.

³The Court notes that Trout only brought the state common law claims against BMW Financial.
 31 There are no allegations against BMW North America or Desert BMW of Henderson. As such, even
 32 if these state common law claims were not preempted, they would be dismissed against BMW North
 33 America and Desert BMW of Henderson.

1 steps as necessary to direct correction, removal or otherwise remedy the existing false and
2 damaging credit information. This is the exact type of conduct which is prohibited under §
3 1681s-2(a)-(b) and thus is preempted under § 1681t(b)(1)(F).

4 Similarly, Trout's claims for breach of contract (count 13) and breach of the covenant
5 of good faith and fair dealing (count 15) are preempted under § 1681t(b)(1)(F). Trout alleges
6 that BMW Financial Services breached the contract by falsely directing that incorrect credit
7 information be published regarding Trout's credit history and that the covenant of good faith
8 and fair dealing was breached when BMW Financial Services willfully and fraudulently
9 reported false and damaging information to credit reporting agencies, for subsequent
10 distribution to a large number of various institutions seeking to verify the credit worthiness of
11 Trout. Again, the conduct alleged in these causes of action is the precise conduct which is
12 prohibited under § 1681s-2(a)-(b) and preempted under § 1681t(b)(1)(F).

13 With respect to Trout's claim for slander of title (count 14), this claim also is preempted
14 under § 1681t(b)(1)(F). Trout alleges that BMW Financial slandered the title of the automobile
15 by wrongfully reporting timely payments as late credit payments and by failing to take
16 reasonable steps to properly verify the fraudulent information. This conduct is preempted
17 under § 1681t(b)(1)(F).

18 Finally, the claims for defamation (count 17) and libel per se (count 19) arise from
19 Trout's claims that BMW Financial Services improperly caused several national credit reporting
20 agencies to report false and damaging information regarding the credit history of Trout. These
21 claims also are preempted under the FCRA. See Davis, 2002 WL 32713429, *12 -13
22 (N.D.Cal.,2002) (defamation claim preempted under FCRA); Gorman v. Wolpoff & Abramson,
23 LLP, 435 F. Supp. 2d 1004 (N.D. Cal. 2006) (libel claim brought by consumer against credit
24 card issuer, alleging erroneous reporting of disputed charges, failed to aver malice or willful
25 intent to injure, and thus was preempted by FCRA). Trout has not alleged any claims of
26 malice or willfulness and therefore, the defamation claim is not authorized under 15 U.S.C. §
27 1681h(e), which allows an action for defamation with respect to the reporting or furnishing of
28 information with malice or willful intent to injure each consumer. See, 15 U.S.C. § 1681h(e);

1 Royal, 405 F.Supp.2d 1177, 1179 -1180 (E.D.Cal.,2005); Nelson v. Chase Manhattan Mort.
 2 Corp., 282 F.3d 1057 (9th Cir. 2002). In fact, Trout concedes that § 1681h(e) is not applicable
 3 and that disclosures contemplated by § 1681h(e) are not at issue in this case. The conduct
 4 at issue is governed by section 1681s-2(1)(a)-(b), not section 1681h(e), and is thus preempted
 5 under section 1681t(b)(1)(F).

6 ***B. State Statutory Claim.***

7 Trout's Third Claim for Relief is for violations of Nevada's "lemon law" found in chapter
 8 597 of the Nevada Revised Statutes. Pursuant to NRS 597.630, a consumer is allowed to
 9 seek replacement or reimbursement of a vehicle if the problem with the vehicle is not fixed
 10 after a reasonable number of attempts and the problem substantially impairs the use and
 11 value of the vehicle to the buyer. Under the "lemon law," upon return of the vehicle, the
 12 manufacturer or dealer must refund the buyer the full purchase price including all sales taxes,
 13 license fees, registration fees and other similar governmental charges, less a reasonable
 14 allowance for the buyer's use of the vehicle. NRS 597.630(1)(b).

15 It is undisputed that BMW offered to buy back the vehicle, which included reimbursing
 16 Trout for the down payment, the payments made on the vehicle and also offering to pay
 17 Trout's attorneys' fees. This constitutes a reasonable refund to the buyer. Under this set of
 18 facts, BMW did not violate Nevada's Lemon Law, but actually attempted to comply with it.
 19 Trout suggests that BMW's offer was in violation of the lemon law because it offered the
 20 money with a release agreement which Trout was not willing to sign. However, Trout offers
 21 no evidence to support this allegation regarding a release to dispute that BMW was not in
 22 compliance with Nevada's lemon law. As stated above, conclusory allegations that are
 23 unsupported by factual data cannot defeat a motion for summary judgment. Taylor, 880 F.2d
 24 at 1045.⁴

25 ***C. Counts 11 and 16 of the Complaint.***

27 ⁴Furthermore, chapter 597 of the Nevada Revised Statutes contemplates the parties
 28 using a release in certain circumstances. See, NRS 597.686. Therefore, BMW's request that
 Trout sign a release, without more substantial evidence, is not by itself/without more, a
 violation of Nevada's lemon law.

1 BMW also asserts that Trout cannot maintain Counts 11 and 16 for violations of the
2 FCRA because there is no private right of action against a furnisher of credit for failing to
3 provide accurate information. In his Opposition, Trout stipulated to the dismissal of Counts
4 11 and 16. Hence, the Court does not need to address the merits of BMW's Motion for Partial
5 Summary Judgment with respect to Counts 11 and 16.

III. CONCLUSION

In accordance with the foregoing,

9 IT IS HEREBY ORDERED that Defendant BMW's Motion for Partial Summary
0 Judgment (#27) is GRANTED and Counts 3, 11, 12, 13, 14, 15, 16, 17, 18 and 19 are
1 dismissed.

DATED: This 12th day of February, 2007.

Blanckow

BRIAN SANDOVAL
United States District Judge